Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1038

DIAMOND NATIONAL CORPORATION,
a Delaware corporation,
Appellant,

v.

STATE BOARD OF EQUALIZATION,
an agency of the State of California,
Appellee.

CROCKER-CITIZENS NATIONAL BANK,
a national banking association,
Appellant,

v.

STATE BOARD OF EQUALIZATION,
an agency of the State of California,
Appellee.

On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Two.

REPLY MEMORANDUM FOR THE APPELLANTS

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1. Appellee's principal argument in its motion to dismiss or affirm (pp. 9-14) is that the California sales tax is distinguishable from the Massachusetts sales tax considered in *First Agricultural National Bank of Berkshire County* v. *State Tax Commission,* 392 U.S. 339 (1968). There, the Court held that the Massachusetts sales tax could not constitutionally be imposed on purchases by a national bank because the legal incidence of the tax fell upon the purchaser. In appellee's view, the legal incidence

of the California sales tax is not upon the purchaser-bank because the statute contains no "mandatory requirement" that the tax be passed on to the purchaser.

However, a simple comparison between the two statutes demonstrates the error of appellee's claim. As this Court noted in *Agricultural Bank* (392 U.S. at 347), the Massachusetts statute provided that "reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in the commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section * * *." In *Agricultural Bank,* the Court held that "this subsection reads to us as a clear requirement that the sales tax be passed on to the purchaser." Moreover, the Court reinforced its conclusion by invoking another provision of the Massachusetts sales tax statute which prohibited as unlawful advertising the holding out by any vendor that he will assume or absorb the tax on any sale that he may make (*id.* at 347-348).

For purposes of the rule of *Agricultural Bank,* the California sales tax statute is essentially equivalent to the Massachusetts provisions. Section 6052 of the California Revenue and Taxation Code provides that: "The tax hereby imposed shall be collected by the retailer from the consumer in so far as it can be done."[1] In addition, Section 6053 of that Code makes it unlawful for any retailer to

[1]The statutory phrase "in so far as it can be done" does not require a different result. That phrase has been construed to indicate a reservation only in those cases where a retailer's pursuit of reimbursement would infringe upon the consumer's contractual or other constitutional rights. See *DeAryan* v. *Akers,* 12 Cal. 2d 781, 786, 86 P.2d 695 (1938). The same is true under the Massachusetts sales tax law which exempts from the sales tax "[s]ales which the commonwealth is prohibited from taxing under the constitution or laws of the United States." Mass. Acts and Resolves, 1966, c. 14 § 6(a). California has a similar provision. See Section 6352 of the Revenue and Taxation Code.

advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold. Thus, just as in the case of the Massachusetts statutes, there can be no doubt from the clear wording of the California provision that the legislature intended that this sales tax be passed on to the purchaser.[2]

Moreover, in *Agricultural Bank,* this Court assumed as true the conclusion of the Massachusetts Supreme Judicial Court (229 N.E.2d at 249) that there was no statutory sanction against a vendor who refused to pass on the tax. But the purported absence of a sanction was not controlling as to the question whether the legal incidence of the tax was on the purchaser. As the Court stated, the force of the law was such that "regardless of sanctions, businessmen will attempt, in their everyday commercial affairs, to conform to its provisions as written." In fact, the record in this case clearly demonstrates that the California commercial practice is to pass on the tax. The parties have stipulated that it is the general custom and practice for California retailers to state separately the "sales tax reimbursement" and for consumers to pay the "sales tax reimbursement" to the retailer (J.S.,5 Appen. J.S.,85). *Agricultural Bank* is therefore controlling.

Given the analysis of *Agricultural Bank,* the previous characterizations of the California sales tax by the California Supreme Court, upon which appellee relies (Motion, pp. 10-11), are no longer relevant to the resolution of the immunity question in this case.[3] As the Court stated in

[2]In fact the California legislature has specifically so stated on at least two occasions, see committee reports, J.S., 15 n. 6.

[3]I.T. 2733, XII-2 Cum. Bull. 46, cited by appellee (Motion, p. 11), which was issued by the Internal Revenue Service in 1933, was declared obsolete by the Service in 1968 in Revenue Ruling 68-100, 1968-1 Cum. Bull. 572.

Agricultural Bank, "Because the question here is whether the tax affects federal immunity, it is clear that for this limited purpose we are not bound by the state court's characterization of the tax" (392 U.S. at 347). At all events, those California cases were decided on the theory that the vendor was legally obligated to pay the tax—a rationale which the Court rejected in *Agricultural Bank.*

2. Finally, the stipulation in *United States* v. *Board of Equalization*, now awaiting argument in the Ninth Circuit (No. 74-3360), does not support appellee's argument (Motion, pp. 6-7 and n. 5) that the legal incidence of the California sales tax is on the vendor. The absence of an express provision in the California sales tax statute giving the seller the right to recover the tax from the buyer is not constitutionally significant. In fact, California law affords the seller the right to sue for reimbursement of the tax if it is separately stated and the buyer accepts the goods or is otherwise contractually bound to reimburse the seller for the tax.[4]

The critical fact, however, is not whether the retailer may sue at law for reimbursement but whether the law contemplates that the tax be passed on to the customer. *United States* v. *Mississippi Tax Commission,* 421 U.S. 599, demonstrates the correctness of this proposition. There, in upholding the state liquor tax on sales to military purchasers, the district court (378 F. Supp. 556, 567) considered it significant that the liquor tax "[could] never become a debt to the supplier separate from the total sales price,

[4]The seller was allowed to recover the separately stated tax in *Graham Bros., Inc.* v. *Los Angeles*, 6 Cal. App. 2d 203, 49 P.2d 452 (1935), pet. for hearing den. Calif. Supreme Court (1935). The seller also has the right to recover the purchase price in these circumstances under the law of sales and the Uniform Commercial Code. *Nakamura* v. *Balish*, 211 Cal. 754, 276 P. 1103 (1931); *Johnson* v. *Besoyan*, 85 Cal. 2d 389, 193 P.2d 63 (1948); California Commercial Code § 2709(1)(a).

nor is it recoverable at law from the purchaser." However, on the authority of *Agricultural Bank,* this Court struck down the tax as unconstitutional as applied to military purchasers. In so holding, the Court stated in terms equally appropriate to this case: "[W]e squarely rejected the proposition that the legal incidence of a tax falls always upon the person legally liable for its payment." (421 U.S. at 607)

For the reasons stated above and in our jurisdictional statement, probable jurisdiction should be noted.

Respectfully submitted,

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